IN THE COURT OF APPEALS OF TENNESSEE
FOR THE MIDDLE SECTION, AT NASHVILLE

In re: Sentinel Trust Company	)	No. M2006-01002-COA-R3-CV
	)	Lewis Equity No. 4781

APPEAL FROM FINAL JUDGMENT OF
THE LEWIS COUNTY CHANCERY COURT
AT HOHENWALD, TENNESSEE

Reply Brief for Appellants
Semtinel Trust Company, Danny N. Bates,
Clifton T. Bates, and Gary L. O'Brien

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Oral Argument Requested

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Some of the comments advanced by the State as arguments are so patently absurd that they cannot be taken seriously,[1] but the one argument having serious content is that the positions put forth by Appellants herein are barred by the "law of the case" doctrine. Appellees base this argument upon a decision of this court they identify as *Sentinel I,* unofficially reported as a single opinion under the styles of *Sentinel Trust Co., et al. v. Lavender* and *In re: Sentinel Trust Company,* 2005 Tenn. App. LEXIS 841 (Tenn.App., M.S., 2005).[2]

That decision, by affirmation of appealed decisions,[3] disposed of appeals of two judgments of the Lewis County Chancery Court, which this Court has ordered combined with the instant appeal for convenience in referring to the records of proceedings in those Lewis County appeals, and also disposed of a single judgment of the Davidson County Chancery Court, as to which this Court has ordered the record retained in the Clerk's office pending ruling by the United States Supreme Court upon present Appellants' pending petition for *Certiorari, Sentinel Trust Company, et al. v. Lavender,* U. S. Supreme Court Docket No. 06–468.

Obviously the doctrine recognizing the binding effect of "the law of the case" is law of recognized validity, but the necessary limitations thereon plainly appear in its statement. As quoted

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[1]*E.g.,* the State's attempt to expand authority beyond that granted by statute by seeking to combine a grant of narrow administrative *authorization* to take particular action, with a *prohibition* to take even that action except upon the condition of court approval, into the pretense that court approval can empower the official to perform an act the statute does not empower him to perform at all (Appellee's Brief, pp. 11-12)—A conditional authorization to sell an insolvent bank's property *to a state or federal bank* combined with a prohibition against selling *without court approval* produces an authorization to sell to an individual who is not either a state or federal bank. This is not even rational thinking.

[2]In referring to particular parts of that decision, Appellants will refer to *"Sentinel I"* and to the asterisk-marked pagination within the Lexis publication of the opinion.

[3]As to each of these, the Supreme Court of Tennessee has declined applications for permission to appeal in the separate cases.

in Appellees' brief (p. 11) from *Memphis Publishing Company v. Tennessee Petroleum Underground Storage Tank Board,* 975 S.W.2d 303 (Tenn., 1998), "The law of the case doctrine . . . is based on the common sense recognition that issues previously litigated *and decided* . . . ordinarily need not be revisited." (Emphasis added). This, by the plain terms of its wording, cannot apply to any issue or contention that a litigant begged and pleaded with an appellate court to decide, but which the appellate court refused to expound or explain. Nothing would seem to justify an inaccurate statement of history by pretending that a contention was decided which the appellate court refused to address—a fact demonstrable by comparing the record and the appellate opinion.

Memphis Publishing Company recognizes that even if a point *was actually decided* in a prior appeal, the "law of the case" doctrine will permit conclusion that a prior appellate decision is not binding if "(2) the prior ruling was clearly erroneous and would result in a manifest injustice if allowed to stand," (975 S.W.2d at 306). *A fortiorari,* the prior ruling cannot be binding as to issues or contentions that the appellate court refused to consider and expound. Correct contentions command conclusions, and if a contention is in rational form of premises leading to a conclusion but is incorrect for some reason, then it is very easy to demonstrate the incorrectness. If an opinion refuses to perform this function, it appears to have refused to adjudicate the issue. If a facially valid argument is made and the Court refuses to address it, there is no possible way any reader can know what reasoning may have led to a disregard of the argument.

The law recognizes that sometimes, an appellate opinion makes final disposition of a case, but in doing so, the decision may fail to even notice an argument which, if correct, would destroy the validity of the case's outcome as adjudicated. Hence, says Tennessee Jurisprudence and the cited authorities upon which it relies:

> " 'No judgment is res judicata as to matters which have not been adjudicated.' . . . It is denied that any case, either from the courts of the United States or elsewhere, governed by the general principles of the common-law jurisdiction, goes to the extent of holding that a judgment of a competent court having jurisdiction of the parties and subject matter is res judicata as to matters and *issues which it did not decide, but which, from the face of its record, it refused to decide* and exclude from its decision, although under the pleadings it

might have decided, and had the right to decide. . . . [U.S. citations omitted] To sustain a plea of res judicata, it must appear that the issue was not only involved in a former suit, but that the issue was *litigated and decided.* Hull v. Vaughn, 23 Tenn. App. 448, 134 S.W.2d 206 (1939)." (22 TENN.JUR., *Res Judicata,* § 30; Emphases added).

The following are among the factors believed to demonstrate that the "law of the case" doctrine furnishes no justification for viewing the *"Sentinel I"* opinion as if it were engraved in stone, bearing in mind that the Opinion did not differentiate between the evidentiary bases of the Davidson County *certiorari* trial record and the Lewis County record of approval/disapproval motions:

- The Opinion takes as its sole source of facts the "Record" certified to the Chancery Court by the Commissioner of Financial Institutions; it took as no part of its factual source the massive body of testimonial evidence received in the Chancery Court. Yet the "Record" was not a transcript or record of a hearing, which may require affirmation if it has adequate evidentiary support. It was merely an **investigative record,** not validated by the tests of any adversarial proceedings. The Opinion repeatedly defined that "Record" as primarily a series of reports of "examinations." By definition, to investigate is "to observe or study by close *examination* and systematic inquiry." (Webster's Seventh New Collegiate Dictionary; emphasis added).

- It was the duty of the reviewing court to take its understanding of the facts in the Davidson County appeal from the two days' evidence received in the Chancery Court, to the extent that when a *certiorari* review of administrative action is by evidentiary trial, and the administrative agency offers no live testimony in response, but merely relies upon the record—even a **real record** of an administrative evidentiary transcript—it may suffer the result of a holding that it offered no opposing evidence, so that the facts are properly determinable from the testimonial evidence offered by the citizen against the state agency, *Wells v. Tennessee Board of Regeants,* 9 S.W.3d 779, at 785 (Tenn., 1999).

- In taking no notice of the evidence properly received by the Chancery Court in the Davidson

County trial, the *Sentinel I* opinion took the investigative record as conclusive.[4] It disregarded the fact that all of the dispositive assumptions made by the Commissioner and his staff in their records of "examinations" were proven to be untrue in the evidentiary trial. As examples, the Court accepted the Department's conclusory assumptions that Sentinel conducted its business contrary to the accepted Federal standards *(Sentinel I,* *11–*12), appearing to disregard Sentinel's brief's *demonstration*—not mere argument—that Sentinel's business was conducted *in accord with* those standards, including the express **permissibility** of financing liquidation costs against bond issuers by allowing overdrafts against the security for each of those issuer's liquidation costs, and the explicit **recognition** that the mode of avoidance of the mingling funds was to keep them under segregated accounts *in the books of the trust company*, as distinguished from separate bank accounts.

- In taking the investigative record of examinations, *i.e.,* the certified record as filed in the Davidson County Chancery Court, as the source of all facts to be considered in both the Davidson County and Lewis County appeals, the *Sentinel I* opinion disregarded the fact that such investigative record was not even a part of the record in the Lewis County Appeals, in which the Commissioner mostly merely made assertions, and the *evidence* defensively submitted in the Lewis Chancery Court proceedings was in affidavit form duplicating that later offered and received testimonially in the *certiorari* trial in the Davidson County Chancery Court. Hence, **all Sentinel's evidence of record** in the Lewis County appeals appears to have been totally disregarded in the *Sentinel I* decision, which contains no indication to the contrary.

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[4] The Supreme Court has noticed that a reason to refuse to apply "the Law of the Case" doctrine is upon remand, when "(1) the evidence offered at a trial or hearing after remand was substantially different from the evidence in the initial proceeding;" *Memphis Publishing Company, supra,* 975 S.W.2d at 306. It would appear obvious, by the same reasoning, that when an appellate opinion based its factual assumptions upon fictitious "facts" instead of the proven facts of record, there should be no legitimate reason to apply the Law of the Case Doctrine to such decision, despite its unquestioned finality.

- In accepting the Commissioner's unwarranted assumption that Sentinel was insolvent on no basis except that Sentinel lacked the assets to fully cover the temporary overdraft negatives then existing in the accounts of the defaulted bond-issuers, the Court was led to accept the Commissioner's sheer sophistry over solid proof that Sentinel was in no sense insolvent. This demonstrated a failure to attempt to appreciate and demonstrate the lack of any relationship between such large current negatives in individual trust accounts and Sentinel's unquestionable solvency:

    - The Opinion recognized that many of the defaulted issues had multi-million dollar deficiencies, but disregarded that each included a profit to the pooled funds of the solvent bond-issuers of at least 50% of the overdraft, and disregarded the fact that each negative (including large profits) was secured by assets exceeding the negative balance. Hence each overdraft account represented accrued profits with no real risk that Sentinel would incur **any liability at all.**

    - The opinion recognized that Sentinel had undertaken that it would be liable for any negative balance at the conclusion of each defaulted bond-issue's liquidations. *(Sentinel I,* pp. *12–*14). Hence, Sentinel's position was purely that of a surety, not a principal currently responsible for *its own debts.* The principal debtor in each case was the defaulted bond- issuer, not Sentinel, and these were not Sentinel's debts. "A surety is one who undertakes to pay money or to do any other act in the event that his principal fails therein." 23 TENN.JUR., *Suretyship,* § 3. These were not only **not present debts** of Sentinel, but they were situations almost certain **not to create any real risk of any liability on Sentinel's part.** In each case, Sentinel's liability undertaken would not arise until liquidation was complete, and it is beyond question that the Commissioner had no factual basis to pretend that this

presented any real risk.[5]

- The following brief comments on relevant points are not intended, and should not be taken, to re-argue the merits of the appeals disposed of in *Sentinel I,* but merely to point out, as permitted, that the decision did not even purport to follow established law, for the following reasons:

  - It is indisputable that no *literal language* gives the Commissioner seizure powers over trust companies as distinguished from banks, so that the only possible way to construe "bank" as meaning "bank or trust" company is to apply the controlling law, *e.g.,* the law of statutory construction.

  - *Sentinel I* took as the basis of its conclusion that "bank = bank or trust company" the statutory sentence providing that ". . . the provisions of chapters 1 and 2 of this title, and the rules thereof, shall also apply to the operation and regulation of state trust companies . . ." *(Sentinel I,* *4–*5, *43–*46). Under Supreme Court decisions, this appears to be a refusal to apply the law of statutory construction, because such body of law does not permit construction conclusions to be drawn from an isolated provision of any statute, *Cummings v. Sharp*, 173 Tenn. 637, 643-644, 122 S.W.2d 423, 425, as impressively quoted and followed in *Rose v. Blewett,* 202 Tenn. 153, 163; 303 S.W.2d 709, 713 (1957).[6]

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[5]The safety of the situation is beyond question. It was proven that Sentinel had successfully completed liquidation of the assets of 50 defaulted bond-issues, *many* with negative balances (including large profits to the pooled fund) of over a million dollars, and each was closed out with full recovery of these negative balances *that included profits for the pooled funds (non-defaulted bond-issuers),* and with disbursement of the remaining funds to the bondholders.

[6] Each of these decisions has been followed ever since, and neither has been subject to any critical comment by any judicial decision.

- Sentinel cannot deny—and has never denied—that from and after the 1999 amendment to the Banking Act, the Act subjected every trust company, including all previously excluded, to Chapters 1 and 2 of Title 45.

- The State's insistence—accepted by the Davidson County Chancery Court and by this Court—that this amendatory language subjecting every trust company to Chapters 1 and 2 *internally* amended the language of the Act to change "bank" to mean "bank or trust company" wherever it appears is affirmatively disproven by the fact that the Act directed that the Commissioner should be empowered to use his bank examination powers over every trust company newly brought under the Act only for the limited period of July 1, 1999 through June 30, 2002. And such disproof is confirmed by other internal expressed differences between powers *vis-á-vis* trust companies and banks.

All the foregoing is submitted solely in support of Appellants' insistence that *Sentionel I* should not be accorded "law of the case" status. Appellants must and do recognize that *Sentinel I* is dispositive of the particular rights it determined, except in the highly-improbable event that the U. S. Supreme Court shall grant *certiorari* and determine otherwise, or in the also unlikely event that Federal Courts shall later make determinations to the contrary upon these Appellants' insistence that Tennessee violated their Federal constitutional rights.

Appellants recognize that they present an apparently unwelcome task to the judiciary in insisting that state officials at the highest level of the executive branch of government have acted illegally by usurping powers never granted to them, and they regret that they are impelled to perform this duty. But equally unpleasant is the alternative that if state officials have usurped such powers, as indicated by any *literal* reading of the statute, such should be recognized as an inexcusable act of

the use of government powers to destroy vested property rights.[7] It is respectfully suggested that adherence to the law is a far more basic and vital principle than the objective of upholding executive positions.

Respectfully submitted,

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[7] It should be borne in mind that the State admitted on the record in the Davidson County *Certiorari* trial that Sentinel's mode of financing default bond-issue liquidation costs through allowing overdrafts had not caused *any loss or delay* in transmitting payments to any bondholder (trust beneficiary), without which no monetary liability may be imposed upon any corporate trustee for its breaches of trust, T.C.A. § 35-3-117(j), and that but for the Commissioner's act of seizure, Sentinel would have continued to complete its liquidations without loss.

Certificate of Service

It is hereby certified that copies of the foregoing Reply Brief have been mailed by First Class Mail, postage prepaid, this October 30, 2006, to :

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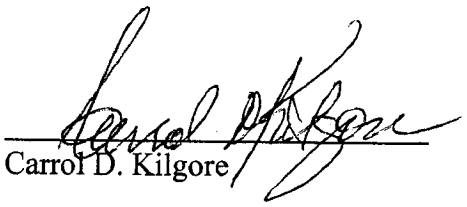

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